

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

NICHOLAS ALBRACHT,

Plaintiff,

v.

INDEMNITY INSURANCE COMPANY
OF NORTH AMERICA,

Defendant.

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2:19-CV-72-Z-BR

**SUPPLEMENTAL FINDINGS, CONCLUSIONS, AND RECOMMENDATION TO
DENY WITHOUT PREJUDICE AS MOOT DEFENDANT INDEMNITY INSURANCE
COMPANY OF NORTH AMERICA’S MOTION TO DISMISS ALBRACHT’S FIRST
AMENDED COMPLAINT**

This Court previously issued a Findings, Conclusions, and Recommendation (ECF 20) on Defendant Indemnity Insurance Company of North America’s (“IIC”) Motion to Dismiss Plaintiff Nicholas Albracht’s (“Albracht”) First Amended Complaint. (ECF 10). The Court deems it appropriate to issue these Supplemental Findings, Conclusions, and Recommendation on the Motion to Dismiss in light of a subsequently-filed amended pleading. For the reasons explained below, the Court recommends that the Motion to Dismiss be DENIED without prejudice as moot.

On November 20, 2019, the Court issued its Findings, Conclusions, and Recommendation to GRANT IIC’s Motion to Dismiss, in which the Court gave Albracht the opportunity to either: (1) use the 14-day period for filing objections to file an amended complaint; or (2) file objections to the Findings, Conclusions, and Recommendation. (ECF 20 at 10). Albracht filed his Second Amended Complaint on November 26, 2019. (ECF 21).

“Courts in the Northern District of Texas generally adhere to the school of thought that an amended complaint, which supersedes the original complaint as the operative live pleading,

renders moot a motion to dismiss the original complaint.” *Garcia v. City of Amarillo, Texas*, No. 2:18-CV-95-D-BR, 2018 WL 6272461, at *1 (N.D. Tex. Oct. 29, 2018), *findings, conclusions, and recommendation adopted*, No. 2:18-CV-095-D, 2018 WL 6268222 (N.D. Tex. Nov. 30, 2018). “However, a motion to dismiss that attacks the original complaint for deficiencies that persist in the amended complaint should not necessarily always be denied as moot. Rather, the court has the discretion to apply the original motion to dismiss to the amended complaint.” *New World Int’l, Inc. v. Ford Glob. Techs., LLC*, No. 3:16-CV-1112-M, 2017 WL 1078525, at *5 (N.D. Tex. Mar. 22, 2017).

Having carefully reviewed Albracht’s Second Amended Complaint (ECF 21), the Court concludes that IIC’s Motion to Dismiss (ECF 10) should be DENIED without prejudice as moot.

RECOMMENDATION

For the above reasons, it is the RECOMMENDATION of the United States Magistrate Judge to the United States District Judge that IIC’s Motion to Dismiss (ECF 10) be DENIED without prejudice as moot. It is further RECOMMENDED that the District Judge remand the November 20, 2019 Findings, Conclusions, and Recommendation (ECF 20) to the undersigned to be withdrawn by her.

The Court notes that the parties may, if they so choose, file a joint notice waiving their right to object to these Supplemental Findings, Conclusions, and Recommendation.

INSTRUCTIONS FOR SERVICE

The United States District Clerk is directed to send a copy of these Supplemental Findings, Conclusions, and Recommendation to each party by the most efficient means available.

IT IS SO RECOMMENDED.

ENTERED December 2, 2019.


LEE ANN RENO
UNITED STATES MAGISTRATE JUDGE

*** NOTICE OF RIGHT TO OBJECT ***

Any party may object to these proposed findings, conclusions, and recommendation. In the event parties wish to object, they are hereby NOTIFIED that the deadline for filing objections is fourteen (14) days from the date of filing as indicated by the “entered” date directly above the signature line. Service is complete upon mailing, Fed. R. Civ. P. 5(b)(2)(C), or transmission by electronic means, Fed. R. Civ. P. 5(b)(2)(E). *Any objections must be filed on or before the fourteenth (14th) day after this recommendation is filed* as indicated by the “entered” date. *See* 28 U.S.C. § 636(b); Fed. R. Civ. P. 72(b)(2); *see also* Fed. R. Civ. P. 6(d).

Any such objections shall be made in a written pleading entitled “Objections to the Findings, Conclusions, and Recommendation.” Objecting parties shall file the written objections with the United States District Clerk and serve a copy of such objections on all other parties. A party’s failure to timely file written objections shall bar an aggrieved party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings, legal conclusions, and recommendation set forth by the Magistrate Judge and accepted by the district court. *See Douglass v. United Services Auto. Ass’n*, 79 F.3d 1415, 1428-29 (5th Cir. 1996) (en banc), *superseded by statute on other grounds*, 28 U.S.C. § 636(b)(1), *as recognized in ACS Recovery Servs., Inc. v. Griffin*, 676 F.3d 512, 521 n.5 (5th Cir. 2012); *Rodriguez v. Bowen*, 857 F.2d 275, 276-77 (5th Cir. 1988).